# Examiners' Report
# Lead Examiner Feedback

## January 2022

Pearson BTEC Nationals
In Applied Law (20168K)
Unit 1: Dispute Solving in Civil Law

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# Grade Boundaries

## What is a grade boundary?

A grade boundary is where we set the level of achievement required to obtain a certain grade for the externally assessed unit. We set grade boundaries for each grade, at Distinction, Merit and Pass.

## Setting grade boundaries

When we set grade boundaries, we look at the performance of every learner who took the external assessment. When we can see the full picture of performance, our experts are then able to decide where best to place the grade boundaries – this means that they decide what the lowest possible mark is for a particular grade.

When our experts set the grade boundaries, they make sure that learners receive grades which reflect their ability. Awarding grade boundaries is conducted to ensure learners achieve the grade they deserve to achieve, irrespective of variation in the external assessment.

## Variations in external assessments

Each external assessment we set asks different questions and may assess different parts of the unit content outlined in the specification. It would be unfair to learners if we set the same grade boundaries for each assessment, because then it would not take accessibility into account.

Grade boundaries for this, and all other papers, are on the website via this link:
http://qualifications.pearson.com/en/support/support-topics/results-certification/grade-boundaries.html

### Awarding BTEC qualifications in 2022

Ofqual has set out their plans for awarding qualifications in 2022 and intend to return to a normal, pre-pandemic, approach to grading standards over by 2023. They have confirmed that 2022 will be a transition year, to reflect that we are in a pandemic recovery period and students' education has been disrupted.

**Our guiding principle and approach to awarding BTEC qualification results in 2022 will be to ensure parity in relation to the approach being taken for GCSE and A level learners.** BTEC courses have a different structure and design to academic qualifications - BTECs are modular qualifications (with assessments taking place throughout the course) compared to GCSEs and A levels which are linear (assessed and awarded at the same time at the end of the year), and therefore our approach needs to be different.

In 2022 we will return to the usual method of calculating BTEC qualification results, however adaptations including, U-TAGs and reduced internal assessment, are in place to provide a comprehensive package of support for students.

The basis of our awarding approach to BTECs this year is to ensure it is as fair as possible for all learners. We will use a range of evidence to set grade boundaries for the external units. Part of this evidence will be to closely monitor learner performance in all assessments that contribute to learners' final qualification grade, to ensure parity with A level and GCSEs.

Further information can be found on our website and via our Social Media channels.

**20168K: Dispute Solving in Civil Law**

| Grade | Unclassified | Level 3 | | | |
|---|---|---|---|---|---|
| | | N | P | M | D |
| Boundary Mark | 0 | 6 | 13 | 24 | 35 |

## Introduction

This was another unusual session. Firstly, the size of the cohort increased dramatically to more than double the largest previous cohort. Secondly, the ongoing impact of the pandemic continues to have direct and indirect consequences on the learners.

Unit 1 forms one of two mandatory units for the Certificate and one of three mandatory units for the Extended Certificate. It contributes 50% of the available marks required for the Certificate.

The assessment followed a now well-established format. In preparing for the assessment, learners will have benefited from making use of the 1806, 1901, 1906, 2001 & 2101 past papers, mark schemes and LE Reports. Furthermore, Pearson have made a variety of other support materials available. These include the specification, delivery guides, administrative support guide, on-line and (when appropriate) face-to-face training sessions, two sets of specimen assessment materials, a set of exemplar responses with accompanying examiner commentaries and the BTEC Law Journal which features updates on key issues.

In Unit 1 learners cover the civil justice system including the civil courts, the track system and appeals as well as alternative methods of dispute resolution and sources of both funding and advice. They also study precedent and the law of negligence. Learners also develop legal skills in research and will use these skills to investigate the way in which precedent might apply to negligence in a given situation by constructing liability and considering potential remedies. Lastly, candidates learn how to reference legal sources and how to communicate professionally with colleagues and clients.

Unit 1 is assessed twice yearly in January and May. The assessment is based on two key events. Firstly, the pre-release of the 'Part A' materials followed a week later by further information and the assessment itself in 'Part B'. The 'Part A' pre-release materials contain legal resources which act as a research catalyst ahead of the 'Part B' assessment. Learners have up to 6 hours during the period between 'Part A' and 'Part B' to undertake their research and produce, individually, up to two sides of A4 notes of legal authorities considered relevant in the light of the 'Part A' information. Learners will be allowed to take these notes into the 'Part B' controlled assessment.

The 'Part B' assessment is a 1 hour and 30-minute session taken under supervised and controlled conditions (please refer to the Administrative Support Guide) during a timetabled session on a date set by Pearson. The

assessment consists of two discrete tasks each worth 30 marks. Learners should be encouraged to split their time equally between the two tasks.
Task 1 consists of a file note and Task 2 is a client letter. Each task is worth 30 marks and the assessment objectives are as follows:

| **BTEC Applied Law: Unit 1: Assessment Objectives** |
|---|
| **AO1** Selection and understanding of legal principles relevant to context (**10**) |
| **AO2** Application of legal principles to facts, analysis of arguments and evaluation of legal principles and arguments to reach conclusions (**16**) |
| **AO3** Presentation and structure **(4)** |
| **Total: (30)** |

During the 'Part B' controlled assessment, learners are required to produce their work using a computer. The two tasks along with a learner declaration of authenticity are then submitted along with a learner record sheet. A number of centres submitted work without including signed authentication sheets, registers and/or learner record sheets and it should be noted that this can lead to delays in marking.

## Introduction to the Overall Performance of the Unit

The overall performance during this session was broadly consistent with previous sessions. The number of entries, as stated above, were considerably higher than any previous session and there was a modest drop in the mean score reflecting some of the differences in the mix of centre types and learner profiles in the enlarged cohort as well as the unknown but doubtless ongoing impact of the pandemic.

### Causes for concern in 2201

This session saw **two** issues that were a significant cause for concern:

Firstly, the misuse of the two sides of A4 notes. It is obvious that learners at some centres are either being given a set of common notes or that they are sharing a set of common notes, either of which would be malpractice.
This has major implications which should not need to be spelled out, but the most obvious issue is the inequality it creates. Learners from centres who are 'playing by the rules' and where learners are relying on the genuine product of their own research are disadvantaged when competing with learners who are being provided with more comprehensive notes which are not the product of their own work.

The evidence and scale of this practice is overt. Although centres generally retain the learners' notes, occasionally whole centres or individual learners mistakenly return them with their Part B submissions. On inspection, it is obvious, especially where large centres are concerned, that patterns of uniform, detailed and identical
notes could not possibly be the 'coincidentally identical' product of the research of in excess of 100 learners. Furthermore, it has been noted that versions of the notes have been shared on social media forums for teachers. Teachers are obviously free to share their own resources for professional development and colleague support purposes, but such materials should not be turning up in the form of learner notes. Other compelling evidence includes errors of law which are repeated across an entire cohort. Centres might argue that well instructed learners could all arrive at the same legal authorities on the same legal topic, but an entire cohort all arriving at the same common error is not a credible or sustainable argument. This is malpractice and must stop. Investigations into the issue for 2201 are ongoing and centres are asked to retain their learner notes. Clarification and support on acceptable practice can be found in the Part A and Part B materials, Delivery Guides and the Administrative Support Guide, as well as occasional notices to centres. To further support this there will be additional guidance published in the BTEC Law Journal this Spring. **To be clear, the two sides of A4 notes should be the product of the learner's own work and any intervention is malpractice.**

Secondly, on both Unit 1 and Unit 3 there was a high incidence of learners having been taught out-of-date law. On Unit 3 there was a significant minority referring to the law on provocation as it stood prior to the Coroners and Justice Act 2009 and on Unit 1 there was a similar significant minority referring to the default application of the so-called *Caparo* three-stage test which no longer applies. Whilst we acknowledge that some teachers are non-specialists and that textbooks often take some time to reflect changes in the law, the position on these points has been made clear through mark schemes of past papers, Lead Examiner Reports, training events, notices to centres and articles published in the BTEC Law Journal. On the Unit 1 point, please refer to the 2101 Lead Examiner Report which dealt clearly with this explicit point.

## Other Issues in 2201

- Many learners had clearly been instructed to cover all bases in duty of care and put down every aspect. Consequently, many of them gained full marks for duty of care in two or three lines worth of work on *Robinson* and then went on to go through the whole of *Caparo* as an

insurance policy. Such learners still got their marks but must have wasted valuable exam time writing out irrelevant material.

- There was some very concerning evidence this year relating to whether learners were ready for the assessment. This may be a result of the significant expansion in numbers and the nature of the new cohort but centres should consider whether it is in learners' best interests to attempt this form of assessment after a single term. There were whole centres this session where considerable numbers of learners simply couldn't engage with the tasks in a meaningful way. Some wrote nothing at all and others could only manage an anecdotal recital of the given facts or casual advice with no legal content whatsoever.

- The habit of writing out (often excessive) case facts continued to be common practice. Explaining what happened in a case to extract a legal principle or to draw a comparison with the source facts (and, therefore, the applicability of a legal principle) is good practice, but simply regurgitating case facts for no good reason is neither creditworthy nor a sensible use of time.

- The examiners reported a persistent adherence to 'template teaching' where centres had taught the whole cohort to respond to the tasks in a heavily prescribed 'checklist' manner. The problem with such an approach is that learners waste time writing out irrelevant material and run out of time. It is also problematic if they have been taught to include material which is wrong. Common examples include:

- Learners going through contributory negligence, every possible angle on causation, the thin-skull rule and *res ipsa locquitor* even though there was no evidence to suggest any of them were relevant.

- In Activity 2, learners commonly feel it is necessary to go through every single type of ADR, funding, advice and every one of the civil tracks and courts instead of being selective and that way saving valuable exam time.

    - In one large centre, every learner went through all the details of legal aid including eligibility criteria, financial limits and the authorities from the Civil Procedure Rules, only to finish what was sometimes half a side of A4 by correctly saying that it wasn't available for personal injury cases and wouldn't be an option.

- Incorrect assertions included things like certain types of ADR being purely specific to certain types of case. For example, that mediation is *only* for family issues and arbitration is *only* for business cases.

# Individual Questions

## Question 1 (File Notes)

Most learners did well here. At the top of the mark range was a requirement that learners explain each element of negligence with appropriate supporting authorities (AO1) and apply it to the scenario to draw a relevant conclusion (AO2). As the focus of the activity shifts from one session to another, so too does the distribution of the marks. On this occasion, they were split into duty of care (1/5th), breach – the objective standard (1/5th), breach – risk factors (1/5th), causation – factual (1/5th) and causation – legal (1/5th) and a conclusion.

**Duty of care**
On this occasion, duty of care was worth 1/5th of the marks where, in the past, it has been as much as 1/3rd. This reflects the comparably simpler task of establishing a duty of care in a straightforward non-novel *Robinson* situation. There were, therefore, more marks to be gained from a thorough approach to breach and causation and less to lose from an incorrect response to duty of care. However, this accurately reflects the correct proportion of relevant law and application in a well-balanced response.
The majority of learners correctly used the *Robinson* approach although quite a few covered the *Caparo* three-stage test as some sort of insurance policy as well. They fell into two broad categories: those who took the 'existing precedent' approach and those who took the 'established duty situation' approach. Both were equally well done and creditworthy approaches. Unfortunately, a significant minority simply applied the *Caparo* three-stage test as though *Robinson* didn't exist and these responses were not creditworthy.

In the first 'existing precedent' approach learners needed to cite a case with similar facts in which a duty had also been held. The most obvious case to use was the source case *Hughes*. Although the legal principle of *Hughes* is on the causation point, the case had sufficient factual similarities to assert that since a duty was held in similar circumstances in *Hughes*, a duty would similarly apply to SolarBodyz. Indeed, the case was 'pre-released' in Part A with a link to its source and learners who researched the case could put

quotes in their A4 notes to support this assertion. They can be found in an appendix to this report but the three most relevant were:

*"It is true that the **duty of care** expected **in cases of this sort** is confined to reasonably foreseeable dangers, but it does not necessarily follow that liability is escaped because the danger actually materialising is not identical with the danger reasonably foreseen and guarded against."*

*"I think that in these circumstances the danger would be a danger of fire of some kind, for example, setting alight to his clothes or causing him bodily hurt. If there is a risk of such a fire as that, I do not think the **duty of care** prescribed in **Donoghue v Stevenson** is prevented from coming into operation by the presence of the remote possibility of the more serious event of an explosion."*

*"In my view, there was a **duty owed** by the defenders to safeguard the pursuer against the type or kind of occurrence which in fact happened and which resulted in his injuries, and the defenders are not absolved from liability because they did not envisage "the precise concatenation of circumstances which led up to the accident." For these reasons, I differ, with respect, from the majority of the First Division, and I would allow the appeal."*

Learners then established a number of points of factual similarity including the following:

- Both cases involved the same harm
- Both claimants were burned in unusual circumstances
- Both cases involved unusual but not unforeseeable risks
- Both cases involved a lack of precautions – they lacked sufficient warnings
- Both cases involved a known source of danger
- Both cases involved defendants not doing what they should have done
- Both cases involved equipment which was safe if used properly but paraffin lamps left out created a source of danger, and allowing access to sunbeds without sufficient warnings also created a risk of danger
- There are similarities in the way the danger arose - an unusual chemical reaction and an explosion
- Both cases involved a defendant providing a public service in circumstances accessible to the public
- Anticipating the presence of children near a known allurement should have been contemplated and is comparable to anticipating bodybuilder clients wearing products known to cause reactions on sunbeds which also ought to have been contemplated

- The sources of danger were effectively left unattended by the defendants in both cases
- Both defendants relied on the argument that the harm was unforeseeable

In the second 'recognised duty situation' approach, learners simply needed to cite a well-recognised existing duty situation, for example, doctor/patient or driver/passenger. Learners expressed essentially the same idea in a number of ways and we took a generous approach to how we interpreted these to reflect the variety of language used in the responses. Essentially, any sensible assertion of a relevant relationship, often based on a consumer/provider notion, was credited. Examples included:

- Owners of premises to customers
- Shop to customer
- Company to customer (or purchaser of services)
- Business to consumer
- Service provider to client
- Owner/occupier or person in control of premises to visitor or 'anyone who comes into their salon'
- Merchant to consumer
- Company to paying customer (or purchaser)
- Licensed premises taking money for a service to customer who has the right to assume that they will take care of you

We also accepted a generalized duty to the general public, a contractual obligation, and a number of learners made direct comparisons to the broad situation in *Donoghue v Stevenson* – although the scenario wasn't strictly a 'product liability' situation, the general sense of a consumer duty was credited where expressed in the right sense.

*Right way to establish a duty of care 1 (existing precedent):*

The first element of negligence is duty of care. Under (1) ✔ Robinson v Chief Constable of West Yorkshire police (2018), for a duty of care to exist, there must be an established case or a duty situation (2) ✓. If not, which is a novel case, Caparo would have to be applied. Regarding this case, there is a similar case (1) which is Hughes v Lord Advocate (1963) (2) where the boy got injured by burns like Adam because they were both not warned (3). This means the duty in Hughes can be applied here to say there is a duty on Solar Bodyz +.

Good response. Correctly states the law on duty with correct supporting case. Takes the 'existing precedent' route. Well applied as sets out the grounds (similarity), links to similarity in source facts (burns and warnings) and uses it to establish duty and draw conclusion.

*Right way to establish a duty of care 2 (established duty situation):*

> To establish whether or not a claimant was owed a duty of care by the defendant the courts will look at whether there are any authorities such as cases, statutes and established duty situations that establish a pre-existing duty of care. This principle was established from the case Robinson v CCWY 2018. In Adan's case he is a paying customer of Solar Bodyz who are a business and this business to customer relationship would be a fixed duty situation. Because of this, Adam is owed a duty of care by the shop.

Good response. Correctly states the law on duty with correct supporting case. Takes the 'established duty situation' approach. Well applied as it sets out the type of duty situation (business to customer), links to the facts by identifying relevant parties and roles (Adam and Solar Bodyz) and draws correct conclusion.

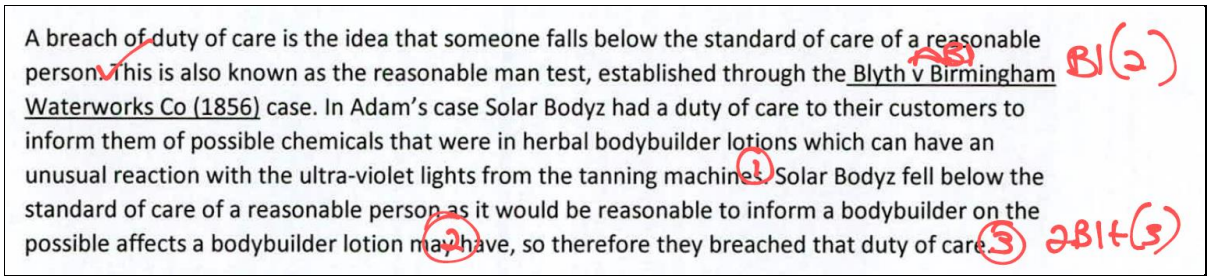
**Breach**

A number of past papers have focused on breach and the level of learner understanding is definitely improving. Breach was the highest scoring single area out of duty, breach and causation. Most learners did well on the objective standard with many scoring full marks. The majority also scored *some* marks on the risk factors although the understanding here is sometimes less secure. Case law understanding was outstanding and a big improvement.

**Objective standard**

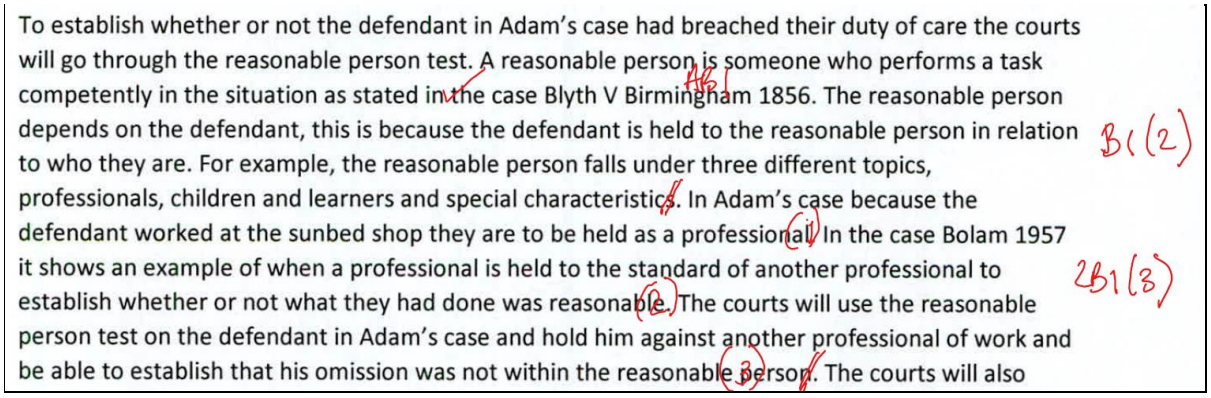
On the objective standard, answers fell into two broad groups – both were equally credited. Some saw this as a straightforward *Blyth* 'reasonable man' situation and some saw it as a professional defendant and used either *Wells* or *Bolam*. Examiners accepted both although the latter would be the preferred approach. Some learners following a pre-taught pattern discussed learners (*Nettleship*) and children (*Mullins/Orchard*) even though neither had any relevance here.

*Right way to establish breach I*:


A breach of duty of care is the idea that someone falls below the standard of care of a reasonable person. This is also known as the reasonable man test, established through the Blyth v Birmingham Waterworks Co (1856) case. In Adam's case Solar Bodyz had a duty of care to their customers to inform them of possible chemicals that were in herbal bodybuilder lotions which can have an unusual reaction with the ultra-violet lights from the tanning machines. Solar Bodyz fell below the standard of care of a reasonable person as it would be reasonable to inform a bodybuilder on the possible affects a bodybuilder lotion may have, so therefore they breached that duty of care.

Good response. Takes the ordinary reasonable man approach. Sets out the law correctly with relevant case. Application identifies the breach (failure to inform), the standard of care (reasonable person) and outcome (breach).

*Right way to establish breach II*:


To establish whether or not the defendant in Adam's case had breached their duty of care the courts will go through the reasonable person test. A reasonable person is someone who performs a task competently in the situation as stated in the case Blyth V Birmingham 1856. The reasonable person depends on the defendant, this is because the defendant is held to the reasonable person in relation to who they are. For example, the reasonable person falls under three different topics, professionals, children and learners and special characteristics. In Adam's case because the defendant worked at the sunbed shop they are to be held as a professional. In the case Bolam 1957 it shows an example of when a professional is held to the standard of another professional to establish whether or not what they had done was reasonable. The courts will use the reasonable person test on the defendant in Adam's case and hold him against another professional of work and be able to establish that his omission was not within the reasonable person. The courts will also

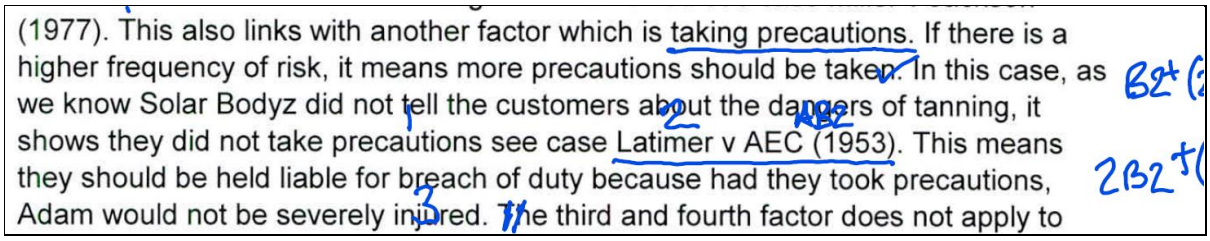
Good response. Starts with ordinary reasonable man approach but then makes a reasoned adjustment to the professional standard and uses relevant cases for each. Application identifies the standard (reasonable professional) and the breach (omission was not reasonable). Might have been improved by drawing a conclusion at the end.

**Standard of care – variation factors**

On the factors that can vary the standard of care, the focus should have been on the seriousness of the risk or the cost of precautions as there was no arguable social utility in the situation and the gravity of the risk was no greater to Adam than to anyone else. He had no special vulnerability that made the gravity of the risk to him any greater. The other two factors had equally compelling arguments to suggest the standard of care should have

been raised in Adam's favour. It would have cost very little either financially or in terms of time to take the greater precaution of giving customers a more thorough warning, especially when compared to the level of harm risked by not doing so. Similarly, although the risk of harm was low, the level of harm was high and the mitigation easy. Most learners got into the right areas of law and made some effort with application. Common reasons for not scoring full marks were, on the law side, only giving half the story. For example, only saying the risk was low without saying the degree of care needs to be commensurate with the risk. On the application side, it was often failing to either a) link the law with the given facts thoughtfully, or b) draw the obvious conclusion. Learners also commonly cite these factors as constituting the whole breach rather than being factors which may alter the existing standard.

*Right way to establish breach risk factors*:


(1977). This also links with another factor which is taking precautions. If there is a higher frequency of risk, it means more precautions should be taken. In this case, as we know Solar Bodyz did not tell the customers about the dangers of tanning, it shows they did not take precautions see case Latimer v AEC (1953). This means they should be held liable for breach of duty because had they took precautions, Adam would not be severely injured. The third and fourth factor does not apply to

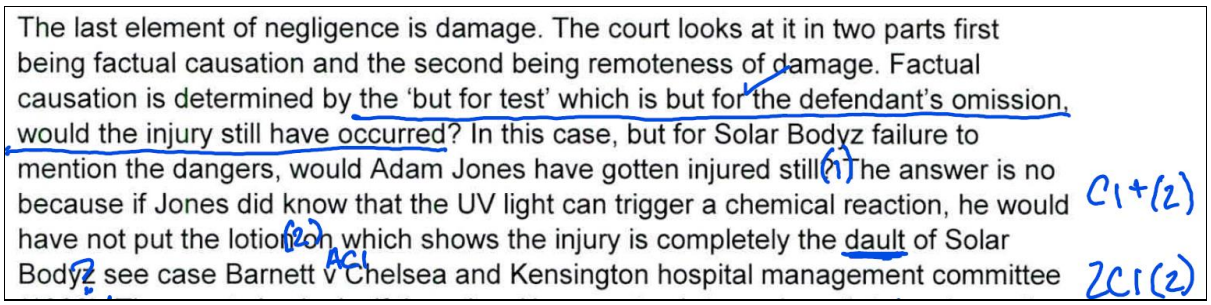
Adequate to good response. The law is briefly explained and although awkwardly expressed (frequency of risk), it has captured the essence of the relationship of a balance between risk and scale of precautions and cites a relevant case (*Latimer*). Application also recognizes that had precautions been taken, injury might have been avoided. This could have been improved by a clearer statement of the law and application which properly weighed the low cost of the precautions by reference to the high price of the risk. Also, a conclusion based on the impact on varying the standard of care, rather than breaching altogether, would have been better.

**Causation**

**Factual causation**

Factual causation was generally done well with few errors or missing authorities. In application it was a very straightforward 'but for' (*Barnett*) situation where 'but for' SolarBodyz failure to warn Adam, his injuries would not have happened. One fairly common reason for losing marks on the law side was the failure to explain the 'but for' test. Learners simply stating that factual causation is established through the 'but for' test are baldly stating a test not explaining it and would not score full marks for AO1.

*Correct way to establish factual causation*:

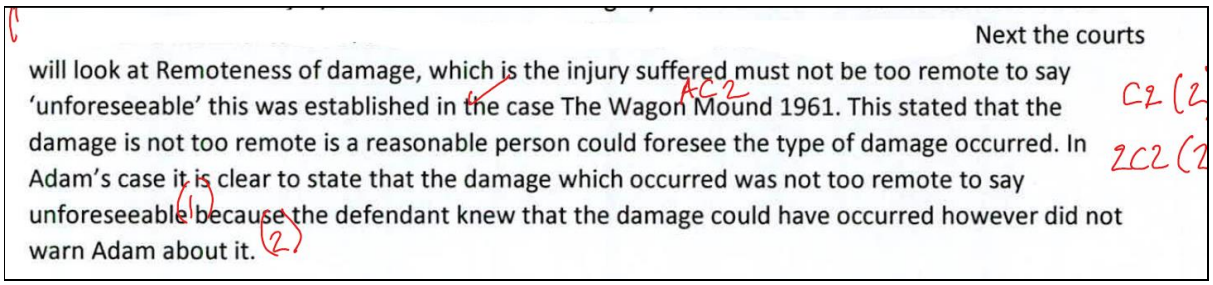

The last element of negligence is damage. The court looks at it in two parts first being factual causation and the second being remoteness of damage. Factual causation is determined by the 'but for test' which is but for the defendant's omission, would the injury still have occurred? In this case, but for Solar Bodyz failure to mention the dangers, would Adam Jones have gotten injured still? The answer is no because if Jones did know that the UV light can trigger a chemical reaction, he would have not put the lotion on which shows the injury is completely the dault of Solar Bodyz see case Barnett v Chelsea and Kensington hospital management committee

Adequate to good response. Here the AO1 is good (full marks) as it correctly sets out the 'but for' test and explains it with a supporting case (*Barnett*). The first part of the application starts with a logical application of the 'but for' test but then tips into a conclusion based on fault which is not relevant to factual causation.

**Legal causation**

This final element was also generally done well. It was, of course, the area of special focus from the Part A pre-release source case of *Hughes v Lord Advocate* so it should have been well anticipated. In the event, fewer learners than we had hoped approached the issue through the slightly more specific lens of *Hughes*, preferring to use the straightforward approach outlined in *Wagon Mound*. The best answers recognized that it didn't matter what degree of harm was foreseen, nor how it happened, provided *some* harm was foreseen as set out in *Hughes*. However, many learners simply recited the standard 'reasonable foreseeability' point from *Wagon Mound* and applied that. Not using the provided source case where it is most appropriate may deny learners full marks.

*Acceptable way to establish legal causation*:


Next the courts will look at Remoteness of damage, which is the injury suffered must not be too remote to say 'unforeseeable' this was established in the case The Wagon Mound 1961. This stated that the damage is not too remote is a reasonable person could foresee the type of damage occurred. In Adam's case it is clear to state that the damage which occurred was not too remote to say unforeseeable because the defendant knew that the damage could have occurred however did not warn Adam about it.

Adequate response. The AO1 here is fine with a normal explanation of remoteness and a relevant supporting case (*Wagon Mound*). The application starts reasonably by asserting that the damage was not too remote, but gets confused by introducing a reason for the defendant knowing about the danger and not warning of it, which is a breach issue and remoteness is an objective assessment anyway.

*Preferred way to establish legal causation*:

> The second part is remoteness of damage which is if damage has less connection to the original act then the defendant should not be held liable. The court assesses this by the reasonably foreseeable test which is if a reasonable preson could predict the injury happening (Wagon Mound). It is also said it doesn't matter about the extent of damage or how it happened, as long as it is foreseeable that an injury could be caused, it cannot be said it's too remote in the case of Hughes v Lord Advocate (1963). In this case, could a reasonable person see injury happening because of the tanning machine? The answer would be yes because people are aware of the dangers. Furthermore, Solar Bodyz knew the dangers. It doesn't matter they didn't see how bad it would be, they knew there was some possibility. Therefore, it wasn't too remote and they are the legal cause.

Good response. The AO1 is good. Having introduced the standard *Wagon Mound* approach, the learner brings in the more appropriate and slightly narrower 'not foreseeing the extent' point from *Hughes*. The application starts with asking the question and responding to it from the perspective of a reasonable person before applying the principle to the scenario.

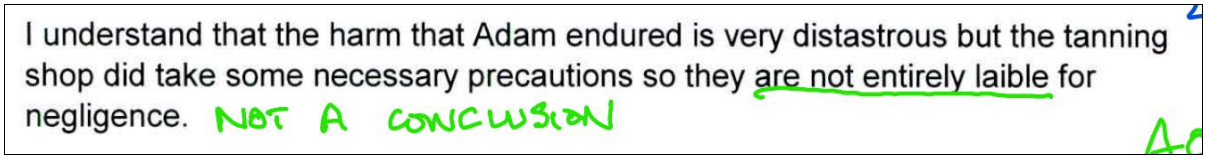
**Other Issues**

- This task is a file note **not an essay** so there is no need for introductions, historical backgrounds of the development of negligence or explanations of the standard or burden of proof in a civil trial.
- By the same token, it is **not a client letter** either. So, although the law should be applied to the given facts, there is no need to address comments to the claimant.
- There are no marks for going into material which is irrelevant. The most common areas are *res ipsa locquitor*, multiple causes, *novus actus interveniens*, mitigation of loss and contributory negligence. Unless the facts make it obvious that any of these are relevant, there is no need to run through them speculatively.
- Some learners are still confusing damage (the causation of) and damages.

- Some learners are being taught that *Donoghue v Stevenson* has been overruled by either *Caparo* or *Robinson* – neither is true.

**Common AO2 issue:**
Some learners are missing AO2 marks because their application is not sufficiently developed. To gain full marks learners should be citing the relevant legal rule or principle, applying it to the given facts and drawing a justified (and correct) conclusion. The two most common reasons for not scoring full marks are not drawing conclusions (or believing them to be implied or obvious), and not linking up with the relevant facts from the scenario.

**Failing to sub-conclude and conclude**
Learners cannot score full marks without a conclusion. The best approach is to encourage learners to sub-conclude as they go along and then finish with a short overarching conclusion. Conclusions must also be definitive:


I understand that the harm that Adam endured is very distastrous but the tanning shop did take some necessary precautions so they are not entirely laible for negligence. NOT A CONCLUSION

**Not making use of the 'Part A' pre-release materials**
Many learners made no use of (or reference to) the Part A pre-release case. As stated above, this may deny learners full marks.

**Assessment focus: AF3**
This assessment focus relates to the quality of the presentation and structure and remains unchanged. It is not an assessment of the quality of spelling, punctuation or grammar. Broadly speaking it works in this way:

- A **complete** task which is effective (**4**) marks*
- An **incomplete** task where the content which is there is effective (**3**) marks

- An **ineffective** task – this will typically be where the learner has provided law and/or legal application but it is presented in a format which may only pick up one or two issues and/or would be confusing to the reader and is, therefore, ineffective (**2**) marks
- An **anecdotal** response – this is where the learner has engaged with the task and attempted to respond to the question but in an entirely anecdotal (i.e. without any reference to the relevant law) manner (**1**)

mark

*Learners will need to have at least 'attempted' **all five** parts of the task to score (4) marks (i.e. they need not all be right as long as they have all been attempted).

## Question 2 (Client Letter)

Learners always seem to engage with the client advice task with real enthusiasm and this session was no exception. In general, the client letters were done to a high standard and scored higher marks than the file note. The most common reason for not scoring higher marks was lack of completeness.

The client letter task clearly sets out in 'Part B' (pg.4) what this task requires:

> Prepare a solicitor's letter that shows your understanding of:
> • the likely **damages** Adam could expect if he is successful
> • the ways the claim could be **funded** and alternative sources of **advice**
> • the use of **Alternative Dispute Resolution** instead of using the appropriate **civil court** for Adam's case.

So, the five key issues are damages, funding, advice, ADR & the civil courts. The marks are distributed evenly among all five, and learners cannot score full marks without not only addressing all five areas but doing so equally well.

Learners are differentiated on AO1 based on the degree to which they have 'explained' a point (full marks) as opposed to simply stating it (partial marks) or baldly stating/listing a point (no marks). Doing well on AO2 is based on the extent to which the application is based on client advice (as opposed to abstract evaluation) and makes links to the scenario facts to do so, as can be seen in the examples that follow.

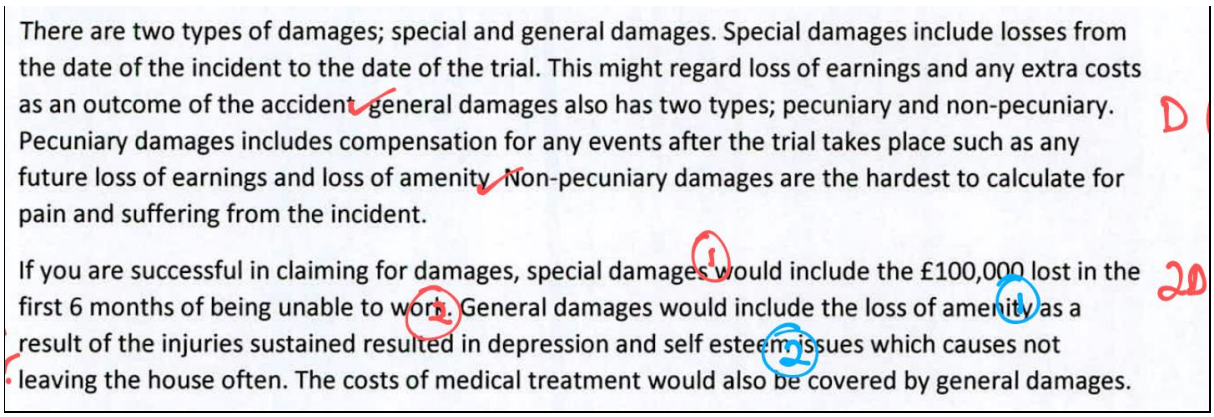
Since Activity 2 is a client letter, it does not require the use of legal authorities. Some centres had clearly prepared learners to provide detailed and intricate citation of authorities where they are really not appropriate. The two main areas were funding and civil justice where there was a lot of detailed citation of authorities relevant to legal aid and the track system. The information was usually generic in nature and the former is not even creditworthy. What seems to be
happening is that learners are taking the authorities in as part of their two sides of A4 notes and then regurgitating all of them even though the legal aid is irrelevant and, by definition, two of the three tracks will also be irrelevant.

The problem here is that learners are wasting time in the exam re-writing irrelevant material instead of focusing on tailoring their response to the question. To be clear, there are no marks in Activity 2 for content which is not relevant to the scenario or for supporting authorities.

**Damages**: Most learners understood that Adam's action would be for both special damages (e.g. lost earnings & medical expenses) and general damages (e.g. pain, suffering, loss of amenity & primary injuries). Furthermore, some learners had a clear understanding of the distinction between lump sums and structured settlements, and which would be appropriate here.

The most common reason for not scoring well, particularly on AO2, was not linking types of harm with types of damages. These learners often picked up AO1 marks for explaining the types of damage but then, effectively, re-wrote the source facts – often as little more than a recital or paraphrasing of the source. Such answers did not score any AO2 marks. AO2 marks need the facts to be linked up with the relevant law and, for high marks, sustained or developed application.

*This example shows adequate but not sustained links between the source facts and the point of advice:*


There are two types of damages; special and general damages. Special damages include losses from the date of the incident to the date of the trial. This might regard loss of earnings and any extra costs as an outcome of the accident. general damages also has two types; pecuniary and non-pecuniary. Pecuniary damages includes compensation for any events after the trial takes place such as any future loss of earnings and loss of amenity. Non-pecuniary damages are the hardest to calculate for pain and suffering from the incident.

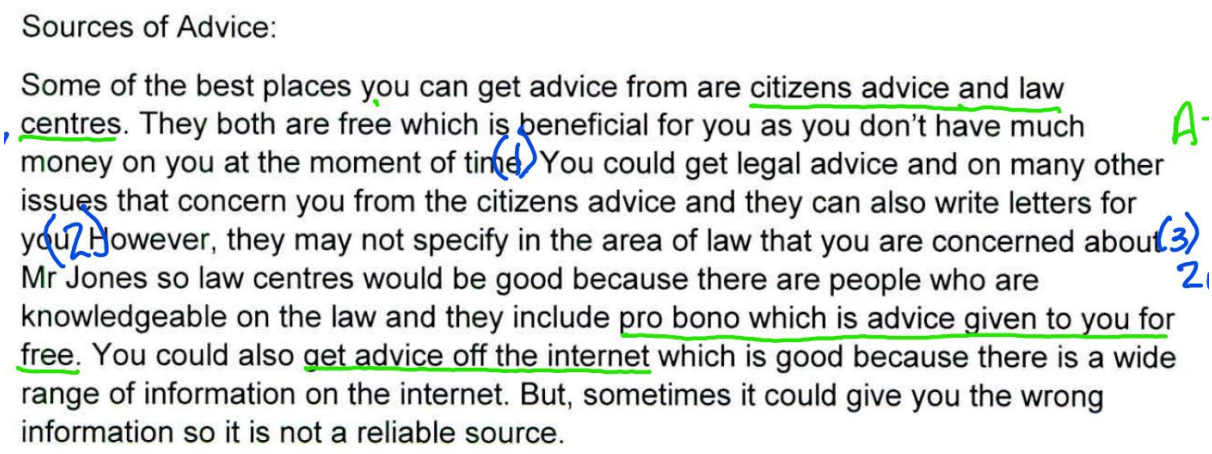
If you are successful in claiming for damages, special damages would include the £100,000 lost in the first 6 months of being unable to work. General damages would include the loss of amenity as a result of the injuries sustained resulted in depression and self esteem issues which causes not leaving the house often. The costs of medical treatment would also be covered by general damages.

Good AO1 and adequate AO2. The first paragraph has more than enough AO1 to gain full marks. The AO2 accurately links lost earnings with special damages and loss of amenity and depression with general damages. The AO2 misses full marks as it doesn't feature a sustained and well-developed single point. For example, please note the sustained and fact-linked development in the following example (indicated (1)(2)(3)):

*'Special damages are pecuniary losses which can be calculated up to the time of the trial. They include loss of earnings and in your case, this would be based on the £100,000 per 6 months figure (1), medical costs which in your case will be treatments for your burns and any medication in respect of your depression (2) and transport costs which in your case may be significant if your burns mean you are unable to walk (3).'*

**Advice**: the inference here is that it is 'alternative' advice, i.e. from someone other than you as his barrister and this may explain responses which were not credited for giving 'a barrister' as a response. Here a good alternative source of advice might be the Citizen's Advice, Law Centres or a *pro bono* scheme. For the AO1, at entry level examiners were looking for something more than just a bare list or a 'name-dropped' source of advice, even if it was something quite minimal but for full marks the expectation was that there would be a self-standing explanation. For the AO2 we were looking, once again, for sustained and developed advice which is linked to the given case facts.

*Example of 'advice' response*:



Sources of Advice:

Some of the best places you can get advice from are citizens advice and law centres. They both are free which is beneficial for you as you don't have much money on you at the moment of time (1) You could get legal advice and on many other issues that concern you from the citizens advice and they can also write letters for you (2) However, they may not specify in the area of law that you are concerned about (3) Mr Jones so law centres would be good because there are people who are knowledgeable on the law and they include pro bono which is advice given to you for free. You could also get advice off the internet which is good because there is a wide range of information on the internet. But, sometimes it could give you the wrong information so it is not a reliable source.

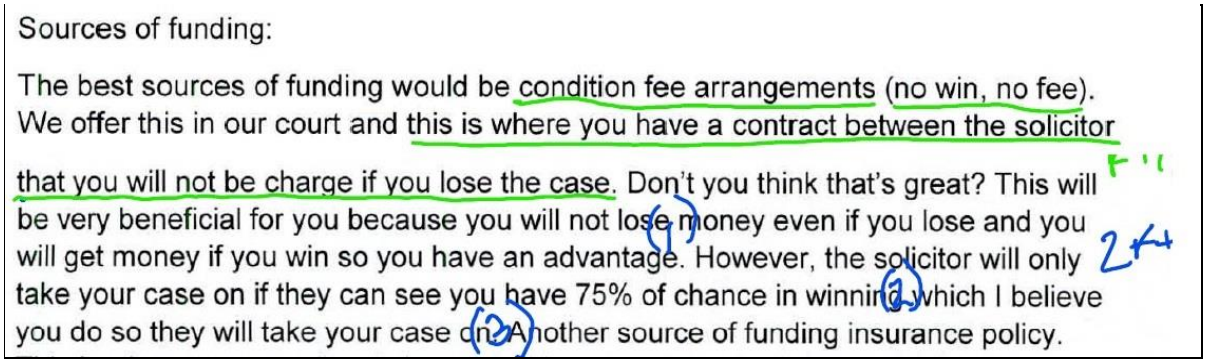
A-

2

Adequate to good response. The four sources offered are borderline bald but the expansion 'free advice' is enough to meet the AO1 criteria. The AO2 is done quite well with sustained development. After recommending Citizens Advice, the learner cites the fact that it is free and links this to the reasonable supposition that Adam may not have much money (1). This is then developed by pointing out that they may lack the expertise (2) which is then further linked to the alternative option of Law Centres who will be experts (3).

**Funding**: most learners recognised the fact that, given his circumstances, Adam (who had clearly been paid well in the recent past) might be able to afford to pay for his own lawyer. Many learners assumed that since he was no longer working
this would not be a good option and most opted sensibly for a CFA especially given their suitability to PI cases. Some learners are still citing legal aid even though it is not available in PI cases and a few did extensive work on legal aid before dismissing their own work. The position on awarding AO1 and AO2 was based on the same principles as the advice above. Like all the content in the client letter, we do not credit generic evaluation if it is not relevant to the scenario and we do not credit unsubstantiated and loaded value judgements.

*Funding example:*


Sources of funding:

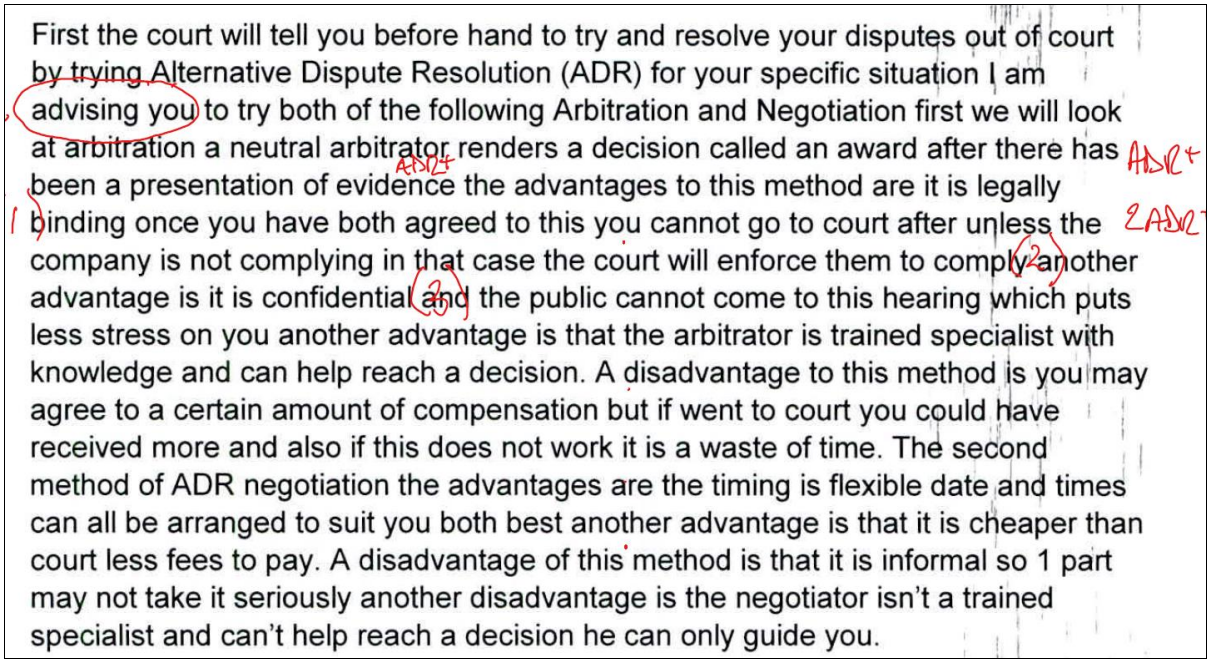
The best sources of funding would be condition fee arrangements (no win, no fee). We offer this in our court and this is where you have a contract between the solicitor that you will not be charge if you lose the case. Don't you think that's great? This will be very beneficial for you because you will not lose money even if you lose and you will get money if you win so you have an advantage. However, the solicitor will only take your case on if they can see you have 75% of chance in winning which I believe you do so they will take your case on. Another source of funding insurance policy.

Adequate AO1 and good AO2. The AO1 is brief but does accurately state, in simple terms, how a CFA works. The AO2 is done quite neatly by setting out the obvious money-saving advantage (1) followed by a possible disadvantage (2) and the final encouragement that the case is likely to win (3).

**ADR**: ADR is usually the part of Activity 2 that most learners engage with and score reasonable marks. On this occasion, as is usually the case with a PI case, learners recognised that mediation would probably be the most suitable for Adam. We did see a lot of ADR responses where learners insisted on covering every form of ADR in turn which is not necessary and scores no extra marks. A number of learners were also wrongly under the impression that certain types of ADR are solely available for a particular type of case only. The AO1 was generally done well. A few learners did simply list the types but the same approach described above applied here as well and bald points or lists were not credited. Out of the five Activity 2 tasks, the AO2 on ADR has a tendency to be more abstract evaluation and less applied knowledge. Unless the evaluation was linked to advice, it was not possible to score full marks in this

way. However, the link required need only be minimal as illustrated in the following example:

*ADR minimal AO2 link example:*

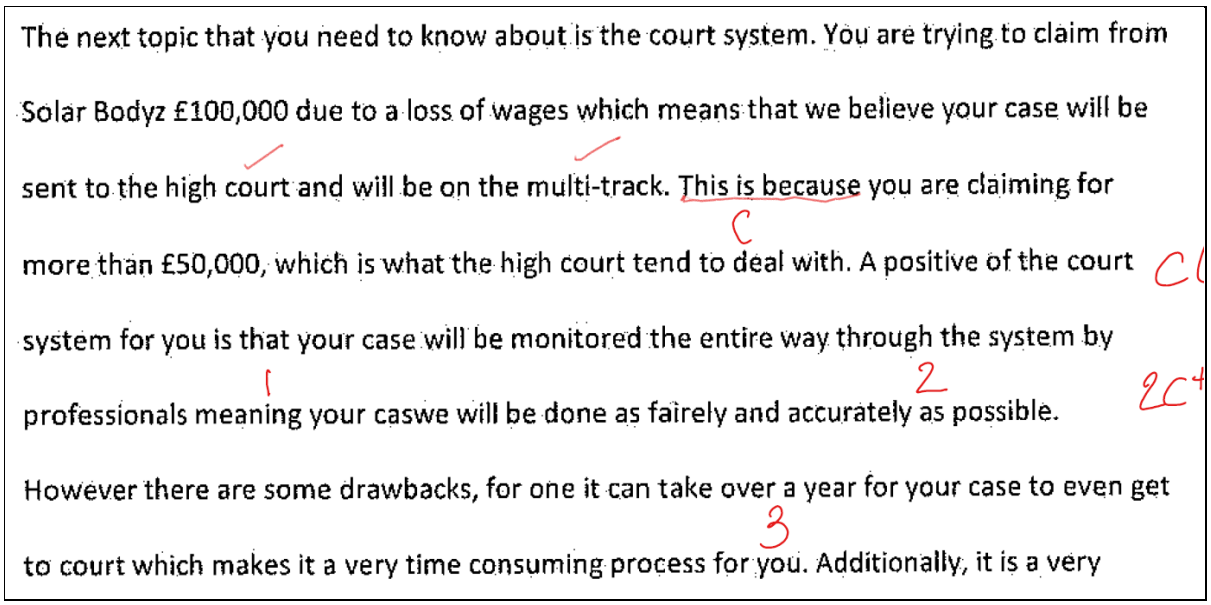


First the court will tell you before hand to try and resolve your disputes out of court by trying Alternative Dispute Resolution (ADR) for your specific situation I am advising you to try both of the following Arbitration and Negotiation first we will look at arbitration a neutral arbitrator renders a decision called an award after there has been a presentation of evidence the advantages to this method are it is legally binding once you have both agreed to this you cannot go to court after unless the company is not complying in that case the court will enforce them to comply another advantage is it is confidential and the public cannot come to this hearing which puts less stress on you another advantage is that the arbitrator is trained specialist with knowledge and can help reach a decision. A disadvantage to this method is you may agree to a certain amount of compensation but if went to court you could have received more and also if this does not work it is a waste of time. The second method of ADR negotiation the advantages are the timing is flexible date and times can all be arranged to suit you both best another advantage is that it is cheaper than court less fees to pay. A disadvantage of this method is that it is informal so 1 part may not take it seriously another disadvantage is the negotiator isn't a trained specialist and can't help reach a decision he can only guide you.

Good response. The AO1 is not extensive but sufficient to qualify as 'expalined'. The AO2 has a definite evaluative rather than advisory feel – binding (1), enforceable (2) and confidential (3). However, the response is framed explicitly in terms of advice (circled in red) so it is being addressed to the client Adam. A slim but sufficient link for full AO2 points.

**Civil justice system**: This is usually the most commonly missed element of Activity 2. Indeed, when it is included, it is often the briefest part of the response or only mentioned in passing as part of the introduction to ADR. On this occasion the amount of money (clearly in excess of £100,000) as well as any potential complexity (given the unusual incident and the nature of the injuries) meant that this was an obvious case for the multi-track to be tried in the High Court. The same approach to marking (as above) applied here to both the AO1 (state/explain) and the AO2 (developed and linked). Most learners who included civil justice tended to do well on the AO2 but often skipped the AO1 or assumed it was implied in their AO2. In the spirit of positive marking, examiners credited these responses flexibly and the example below is illustrative.

*Civil justice example*:


The next topic that you need to know about is the court system. You are trying to claim from Solar Bodyz £100,000 due to a loss of wages which means that we believe your case will be sent to the high court and will be on the multi-track. This is because you are claiming for more than £50,000, which is what the high court tend to deal with. A positive of the court system for you is that your case will be monitored the entire way through the system by professionals meaning your caswe will be done as fairely and accurately as possible.

However there are some drawbacks, for one it can take over a year for your case to even get to court which makes it a very time consuming process for you. Additionally, it is a very

Adequate to good response. The AO2 here is good. As well as identifying the appropriate court and track underpinned by the correct reason, there is advice about the positive aspects of this as well as drawbacks – more than enough for full AO2 marks. The issue here is that there is little, if any, AO1. Fundamentally, the learner does not describe or explain the track or the court. Since the learner had plenty of AO2 marks, the examiner credited the statement 'which is what the high court tend to deal with' flexibly as AO1. However, learners should be reminded not to take marks for granted – AO1 needs to be explained in its own right and cannot be credited as 'implied knowledge' as this would lead to issues of double crediting.

**Assessment focus: AO3**

Everything said above regarding AO3 for Activity 1 applies equally here. However, there were more 'incomplete' tasks on this Activity so (3) was a more common score.

## Summary

- Please ensure the two sides of A4 notes taken into the Part B controlled assessment are the learner's own work.
- Please ensure that learners are taught the most up-to-date law and refer to Pearson materials detailed in this report to support this.
- Please discourage learners from using an inflexible tick-list or template approach which forces many of them to waste time on irrelevant points that gain no credit.
- There is no need to use authorities in Activity 2 and there is no credit for generic material which is not relevant to the scenario.
- Activity 1 is a file note and there is no need (or credit) for irrelevant content such as the historical background of negligence or the historical development of duty of care.
- Please discourage learners from reciting irrelevant and lengthy case facts.

## Appendix A

### Duty of care quotes from Hughes v Lord Advocate

*"So, we have (first) a **duty** owed by the workmen, (secondly) the fact that if they had done as they ought to have done, there would have been no accident, and (thirdly) the fact that the injuries suffered by the appellant, though perhaps different in degree, did not differ in kind from injuries which might have resulted from an accident of a foreseeable nature. The ground on which this case has been decided against the appellant is that the accident was of an unforeseeable type. Of course, the pursuer has to prove that the defender's fault caused the accident, and there could be a case where the intrusion of a new and unexpected factor could be regarded as the cause of the accident rather than the fault of the defender. But that is not this case. The cause of this accident was a known source of danger, the lamp, but it behaved in an unpredictable way."*

*"In a word, the Post Office had brought upon the public highway apparatus capable of constituting a source of danger to passers-by and in particular to small, and almost certainly inquisitive, children. It was therefore their **duty** to see that passers-by, "neighbours" in the language of Donoghue v. Stevenson, were, so far as reasonably practicable, protected from the various obstacles, or (to children) allurements, which the workmen had brought to the site. It is clear that the safety precautions taken by the Post Office did not in this instance measure up to Lord Atkin's test."*

*"It is true that the **duty of care** expected in cases of this sort is confined to reasonably foreseeable dangers, but it does not necessarily follow that liability is escaped because the danger actually materialising is not identical with the danger reasonably foreseen and guarded against."*

*"I think that in these imaginary circumstances the danger would be a danger of fire of some kind, for example, setting alight to his clothes or causing him bodily hurt. If there is a risk of such a fire as that, I do not think the **duty of care** prescribed in Donoghue v. Stevenson is prevented from coming into operation by the presence of the remote possibility of the more serious event of an explosion."*

*"In my view, there was a **duty owed** by the defenders to safeguard the pursuer against the type or kind of occurrence which in fact happened and which resulted in his injuries, and the defenders are not absolved from liability because they did not envisage "the precise concatenation of circumstances which led up to the accident." For these reasons, I differ, with respect, from the majority of the First Division, and I would allow the appeal."*

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